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No. 716

In The

Supreme Court of the United States

October term, 1963

JOHN L. LEWIS,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In this action arising under the Federal Employers' Liability Act and the Safety Appliance Act, did the trial court correctly leave for the jury's determination as an issue of fact whether or not Section 2 of the latter Act applied to the pertinent railroad cars in this case?

2. Was the trial court correct in submitting the issue of whether Section 2 of the Safety Appliance Act applied to the two cars to be moved as a question of fact for the jury or should the trial court have instructed the jury that the Act applied to those two cars as a matter of law?

3. Was the trial court correct in instructing the jury, in effect, that liability of the respondent under Section 2 of the Safety Appliances Act would apply "if the petitioner was between the two correct cars?" thereby predicating the applicability of the Act upon the conduct of petitioner?

4. Was error committed in the refusal by the trial court to instruct the jury in effect that petitioner was not, as a matter of law to be held negligent in the event that a violation of the Safety Appliances Act caused in whole or in part his injuries?

5. In view of the record herein, was the verdict of $5,000 rendered by the jury in favor of the petitioner and against respondent a lawful one?

STATEMENT OF THE CASE

The facts of this case appear in the Statement of the Case set forth in the brief of petitioner.

Respondent emphasizes the fact that old Track No. 8 was used completely as a storage track for cars destined for destruction or repair and that no cars standing on this track were in use in moving interstate traffic. The cars which are placed on old Track No. 8 are taken out of service, until it is determined what repairs are to be made, if repairs are to be made. It is determined whether repairs are to be made to the cars while standing on old Track No. 8 and, if not, the cars are to be destroyed and never put back into service.

The cars in question in the instant case were located on old Track No. 8 for at least eight months prior to Petitioner's injury and again Respondent emphasizes that in resting on old Track No. 8 for this period of time, the cars in question were definitely not in use on Respondent's line in moving interstate traffic.

ARGUMENT

1. No Prejudicial Error Was Committed with Regard to the Federal Safety Appliances Act.

The case before this Court on Petition for Writ of Certiorari is one in which all the factual issues as alleged by petitioner in his petition were submitted to the jury for its determination in the trial court. The issues as submitted to the jury involved both the Federal Employees' Liability Act and the Federal Safety Appliances Act. Outside of petitioner's claim of excessively low verdict, petitioner alleges error in regard to the Federal Safety Appliances Act. The respondent has made no appeal in this case although it might have well done so because respondent maintained at the trial level, as it maintains before this Court, that issues under the Safety Appliances Act should not have been submitted to the jury.

Petitioner misinterprets the trial court's charge to the jury when he attempts to show that the court made applicability of the Safety Appliances Act depend upon whether or not plaintiff was negligent. Petitioner is confusing the court's clear references to the issue of whether petitioner's negligence was the sole cause of his injuries with the court's charge on contributory negligence under the Federal Employees' Liability Act. Petitioner's conduct is properly to be considered under the Safety Appliances Act in relation to the issue of causation. If the petitioner's negligence precluded any violation of the Act from being a proximate cause of his alleged injuries then there can be no recovery under the Act. *Minneapolis, St. Paul and Sault Ste. Marie Railway Company v. Gonsior*, 203 U.S. 396 (1906).

Furthermore, the trial court made it quite clear that if a violation of the Act was found to have been committed by respondent, the only issue remaining was that of causation

(R. 467). Petitioner attempts to find error with the following portion of the court's charge:

> "If the plaintiff was working on the two correct cars in the course of the execution of his switch sheet then defendant would be liable and the only remaining question for you to determine would be the amount of compensation due him."

It is difficult to find any error prejudicial to petitioner in that portion of the charge. To the contrary, it would appear that such language was actually prejudicial to respondent because it removed from the jury's consideration all evidence as to causation under the Act except whether or not petitioner was between the correct cars.

At page 19 of his brief, petitioner deduces that the coupler must have been at least a partial cause of his injuries. It serves no useful purpose to speculate upon what basis the jury arrived at its verdict, and petitioner overlooks the obvious possibility that the jury could have determined that petitioner's negligence was the sole cause of his injuries as far as any defective coupler (and thus a violation of the Safety Appliances Act) is concerned, and still have found that his negligence was not the sole cause in regard to one of the specifications of negligence on the part of respondent.

In regard to the submission of the question to the jury regarding the applicability of the Safety Appliances Act, there is authority which holds the applicability of the Act can be properly left for the determination by the jury. An example of such authority is found in the case of *Clark v. Atlantic Coast Line Railroad* (4th Cir. 1957) 244 F. 2d 368, where the court said at page 374:

> "There appears to us to be genuine issues of material facts as to whether Terminal's specific activities constituted hauling the car or permitting it to be hauled or used on its line within the meaning of Section 11."

It is resolutely maintained, however, that the Safety Appliances Act should have been held as a matter of law not to apply in the instant case, and, therefore, if any error was committed in the trial court, it was error favorable to petitioner. The section of the Act which was involved in this case was 45 U.S.C.A. Section 2, which reads as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be *hauled or used on its line* any car *used in moving interstate traffic* not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (Emphasis added.)

The applicability of the Act in the instant case is to be determined by the meaning of "hauled or used on its line" and "used in moving interstate traffic." These phrases, with a few exceptions, occur throughout the Safety Appliances Act, and at various times the courts have been called upon to give them construction. The decisions of the courts which have faced this issue leave no doubt that the cars involved in this case, and particularly the stock car, were not in "use on the line" of respondent and were not "used in moving interstate traffic."

The authorities are unanimously agreed that the Safety Appliances Act does not apply to cars which have been taken out of service and are in the process of repairs. The case of *Baltimore & Ohio Railroad Company v. Hooper* (Cir. 6th 1924) 297 F. 919, shows that a car being repaired is outside the scope of the Act and that this must be so considering the nature and purpose of the Act. The court said at page 922:

> "The act of equipping the vehicle originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of law, and are not to come under the judgment acts which the law intends to remedy."

The court in the *Reaves* case also found statutory grounds for its decision by reference to 45 U.S.C.A. Section 13. That section provides a criminal penalty for use of defective cars; but provides that a car may be moved without penalty, if the defect occurs while a train is enroute and the movement of the car is necessary and to the nearest available repair point. The court observed that while civil liability for an injury to an employee is maintained during movement of a car to a repair point, it does not extend beyond the time that the car has reached such repair point.

Several decisions have been concerned with the issue of when a car is considered to be undergoing repairs and thus not in "use". For example, *Texas & P. R. Co. v. Brashear*, 218 U.S. 611 (1916) involved a car which was placed on a spur track to await removal to the repair tracks. After remaining on the spur track for a number of days, the car was moved to the repair shop and the plaintiff was injured in that movement. In holding the Safety Appliances Act applicable the Court referred to 45 U.S.C.A. Section 13, thus making it clear that the car had not yet reached the repair point.

Another such case is that of *Blazin v. Southern Pacific Company* (D.C. Cal. 1954) 127 F. Supp. 20. The *Blazin* case clearly indicates that the Safety Appliances Act does not apply to the facts in the instant case. In holding the Act applicable, the court, in *Blazin*, relied upon the particular language of 45 U.S.C.A. Section 4. That section uses the phrase "use in interstate commerce", as compared to other sections of which Section 2 is one, which contain "use on its line" and "used in moving interstate traffic." Indeed the court stated, at page 22:

> "The applicability here differs from that of other sections of the Act which apply to use 'on its line', 45 U.S.C.A. Sec. 11, 23 or used 'in moving interstate

traffic", 45 U.S.C.A. Sec. 5. Use on the line or moving traffic is certainly more restrictive in application than use in interstate commerce."

The Court concluded, at page 23:

"The car was in use in interstate commerce even though being switched to the heavy repair track. That it may not have been in use in moving interstate traffic or in use on the carrier's line is immaterial."

In *Bratton v. Terminal Railroad Association of St. Louis*, 303 U.S. 10 (1938) the plaintiff was a car inspector engaged in inspecting cars received from another railroad to see if they should be accepted by his employer. The plaintiff was injured as a result of a defective grabiron. In holding that the Safety Appliances Act applied, the court said, at page 13:

"If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case *where a defective car has reached a place of repair*." (Emphasis added)

Once a car has been placed on repair tracks by a railroad, however, such car is not considered in "use" on its line. In *Kaminski v. Chicago, Milwaukee, St. P. & Pacific Railroad Company*, 180 Minn. 519, (1930) Cert. Den. 282 U.S. 872 (1930) a car was placed in a repair yard consisting of a series of tracks used for the repair of various defective appliances. As the car was being moved from one repair track to another repair track for additional repairs, an employee was injured as a result of a defective grabiron. The court said, at page 522:

"We understand these cases to hold that, although a car with defective appliances is being moved for the purpose of taking it out of service and placing it at the point where it is to be repaired, it is within the operation of the Safety Appliance Act during such move

ment. But we have been cited to no case and know of none which goes to the extent of holding that a car with defective appliances which has been taken out of service and has been placed on a repair track to be repaired in a yard used exclusively for the purposes of making repairs, and which is actually in the process of being repaired, is still within the operation of the Safety Appliances Act."

The court then reached its holding, at pages 524 and 525:

"We reached the conclusion that where a bad order car has been withdrawn from service and taken to and placed in a repair yard where it is being repaired, subsequent movements of the car made in the course of the work and for the purpose of facilitating it are not within the operation of the Safety Appliance Act."

The Supreme Court of the United States, in *Brady v. Terminal R. Co.*, *supra*, cited with apparent approval the case of *New York, C. & St. L. R. Co. v. Kelly*, (Cir. 7th 1934) 70 F. 2d 548. In the *Kelly* case, the plaintiff and his crew were engaged in a switching movement on repair tracks. The area in which they were working was used for repair only. The crew had moved onto a dead end repair track and made a coupling. The plaintiff thought the crew had accidentally moved the car in question, and was injured while attempting to set the brakes on the car. The court stated, at page 550:

"After a defective car reaches the place of repair, the Safety Appliances Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the Act, nor does mere shifting of cars within the place of repair put the car 'in use' within the meaning of the statute."

In the instant case, the stock car with the missing coupler had been taken out of service and placed on a track used solely for cars in the need and process of repair about eleven months prior to the alleged accident. The adjacent

tracks were also used only for repair and not for the making up of trains to travel in interstate commerce. Indeed, the stock car was so far removed from service and so far out of "use" that it was to be destroyed and was so marked. The movement of the car for the purpose of loading it on a flat car was to be accomplished solely within the limits of the repair tracks. The authorities discussed above referred to whether or not a car was undergoing repairs, but manifestly such authorities must apply to a situation where a car should be destroyed. Destruction of the car was a contemplated action entirely in compliance with the Safety Appliance Act and not in violation thereof. The respondent submits that there can be no situation where a car is further removed from being "used on its line" and "used in moving interstate traffic" than the situation before the Court.

Little reference need be made to petitioner's claim of error concerning the question submitted to the court by the jury during deliberation. It is obvious the question related to the computation of damages where both parties have been found negligent. It concerned the manner of reduction of damages for petitioner's contributory negligence under the Federal Employers' Liability Act, and the answer of the trial court was properly responsive. There could be no error in the answer for matter which would refer the Jury's attention to issues not called for by the questions.

2. No Prejudicial Error Was Committed with Regard to the Applicability of the Federal Safety Appliances Act as a Matter of Law.

Petitioner contends that the trial court committed error in the refusal to instruct the jury that if a violation of the Safety Appliances Act caused in part the petitioner's injuries, petitioner cannot be held to have been negligent.

Petitioner overlooks a portion of the charge made by the trial court (R. 468) in which Sater, J. says as follows in describing the applicability of the Safety Appliances Act:

> "If the couplers in question were defective or inefficient under this law, and proximately caused the occurrence, you may stop there because the defendant would be liable."

It must be assumed that the jury understood from the language of the charge the correct difference in manner of application of negligence and contributory negligence between the Safety Appliances Act and the Federal Employers' Liability Act.

3. The Verdict Rendered for Petitioner and against Respondent Was a Lawful Verdict.

If the verdict of the jury was too low in petitioner's estimation, it can only be said that the jury was properly charged on the questions of liability and damages. The jury had the duty to weigh the evidence in regard to damages and it is not known to what extent, if any, the negligence of the petitioner played a part in the amount of the verdict. Nothing is shown to indicate that the verdict was excessively inadequate and it can only be assumed that the jury delivered the verdict on the basis of the weight of the evidence as presented during the trial.

4. Petitioner Has Failed to State a Case for Writ of Certiorari.

It has already been pointed out that the decisions of the courts below were decided in a way which was in accord with the applicable decisions of this Court. There was no federal question of substance decided which has not heretofore been decided by the Court. The cut-to case was reviewed and heard on the briefs and oral argument by the

Franklin County Court of Appeals of Ohio. That court unanimously affirmed the verdict of the trial court. The Supreme Court of Ohio did not consider this case one proper for review as Petitioner's motion to certify the record was denied.

Respondent resolutely submits that this is not a case for the granting of a writ of certiorari. Two courts have concurred in their views of the case and petitioner has failed to bring himself within Rule 19 of the Rules of the Supreme Court of the United States, which indicates the considerations which govern review on certiorari.

It can only be said that the lower courts have properly applied the well established and settled law as set forth by this Court and that manifestly this Court should not sit in review of these lower Courts which have properly applied the law.

CONCLUSION

In conclusion, it is submitted that the decision of the Franklin County Court of Appeals affirming the decision and verdict of the Common Pleas Court of Franklin County, Ohio, and the denial of the Supreme Court of Ohio to grant a motion to certify the record are entirely in accordance with the controlling decisions of the Court, as well as the controlling decisions of other Courts of Appeals hereinabove cited.

The trial judge did not commit error in instructing the jury as to the applicability of the Federal Safety Appliances Act, but properly charged the jury as to the application of and the distinction between this Act and the Federal Employers' Liability Act. The issues were properly presented to the jury and the jury properly considered all the evidence presented at the trial in view of the Court's instruction and rendered a just and adequate verdict accordingly. Petitioner has failed to state a sufficient cause to merit further consideration by the Court on writ of certiorari.

Wherefore, respondent submits that the petition for writ of certiorari be denied.

Respectfully submitted,

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